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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/054,119	11/13/2001	Juergen Kaufmann	089469-000000US	6450
20350	7590	07/28/2004	EXAMINER	
TOWNSEND AND TOWNSEND AND CREW, LLP TWO EMBARCADERO CENTER EIGHTH FLOOR SAN FRANCISCO, CA 94111-3834			ROSENBERGER, RICHARD A	
			ART UNIT	PAPER NUMBER
			2877	

DATE MAILED: 07/28/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/054,119

Applicant(s)

KAUFMANN, JUERGEN

Examiner

Richard A Rosenberger

Art Unit

2877

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 10 May 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-39 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-39 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

1. Claims 1-39 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim claims 1-9 of copending Application No. 10/054,516 and claims 1-28 of copending Application No. 10/054,116. Although the conflicting claims are not identical, they are not patentably distinct from each other because the three applications are all directed to the same general invention, a gas permeable probe. It is unclear what the distinctions among the claimed subject matter in these three applications is intended to be. The same subject matter appears to be claimed in various degrees across the applications. For example, the independent claims 1 and 32 in this application, 10/054,119, claims a bellows, which is also claimed in claim 28 of 10/054,116.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented; note, however, that 10/054,116 has been allowed, although it is not, as of the date of this action, yet patented.

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

3. Claims 1-39 are rejected under 35 U.S.C. 103(a) as being unpatentable over Baskins et al (US 4,549,080) in view of Bragg et al (US 4,749,276).

Baskins et al shows a gas permeable probe with an elongate hollow structure having first and second ends defining an optical cavity having a fixed length, a mounting structure, optical window (22) at the first end, a reflector at the second end for returning light to the first end of the hollow structure, and a connecting structure connecting the pieces together.

The Baskins et al reference does not show including a bellows in the structure. It is known in the art to include a bellows in such structures; see the bellows taught by Bragg et al. Bragg et al teaches, in a similar structure having an elongate hollow structure having a fixed length, providing the bellows “mirror adjustment” (column 5, line 16-17). It would have been obvious to provide such a bellows in an instrument such as shown by Baskins to achieve the sort of adjustability taught by the references. It is clear that the reflector 21 of Baskins must be positioned and maintained in alignment so that the light will properly reflect back to the detector; it would thus have been obvious to provide the sort of adjustability taught by Bragg et al for mirror 21 of Baskins so that the alignment may be easily achieved and maintained in place.

Baskins et al includes a hollow tube (16) filled with a gas that does not impair the measurement (column 8, line 49). Baskins et al teaches a temperature sensor (thermocouple 28) to sense temperature of the gas (column 37-43); sensing

other gas parameters known to affect the measurement, such a pressure, would have been obvious. Baskins et al teaches providing a heater; column 8, lines 38-41). Baskins teaches using flanges to mount various of the elements.

4. The remarks filed 10 May 2004 have been considered. The Remarks relating the to Shu-Ti Lee et al reference with regard tot the claims as amended are noted, but the rejection above no longer depends upon that reference. The Bragg reference teaches that “mirror adjustment 72 may also be joined with a flexible coupling such as bellows ...”, as set forth above, such mirror adjustment for mirror 21 of Baskins would have been obvious.

5. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

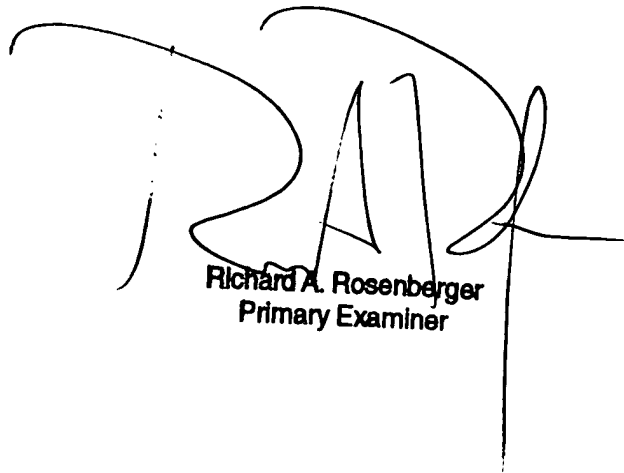
A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

6. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Richard A Rosenberger whose telephone number is (571) 272-2428. The examiner can normally be reached on Monday through Friday during the hours of 8:00-4:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Gregory J. Toatley, Jr. can be reached on (571) 272-2059. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

R. A. Rosenberger  
23 July 2004



Richard A. Rosenberger  
Primary Examiner